87-623

Supreme Court, U.S.
FILED
OCT 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

GARY HENSLEY

Petitioner,

v.

ROBERT STANLEY and THEODORE WILLIAMS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Kenneth N. Flaxman
53 West Jackson Boulevard
Suite 1315
Chicago, Illinois 60604

(312) 431-0082

Frederick F. Cohn
205 West Wacker Drive
Suite 1515
Chicago, Illinois 60606

Attorneys for Petitioner

41pp

QUESTIONS PRESENTED

1. When an innocent man spends 111 days in jail because of an erroneous pre-trial identification that had been induced by an unnecessarily suggestive lineup,

   Are the police officers who allegedly caused the innocent man to be mistakenly identified subject to suit under 42 U.S.C. §1983 for damages resulting from the deprivation of liberty?

2. When the evidence is not disputed that petitioner, the United States Marine standing on the right in the above pictured lineup, was mistakenly identified because he was the only person with a "military style" haircut, may a federal court of appeals find in the first instance that the lineup was not so unnecessarily suggestive as to result in a substantial likelihood of a mistaken identification?

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 16, 1987.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-9) is reported at 818 F.2d 646 (7th Cir. 1987). The opinion of the district court (App. 12-15) denying respondents' motion to dismiss is not reported; the opinion of the district court granting respondents' motion for summary judgment (App. 13-16) is reported at 633 F.Supp. 1251 (N.D.Ill. 1986).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 11) was entered on May 12, 1987; petitioners' timely petition for rehearing was denied on July 16, 1987. (App. 12.)

CONSTITUTIONAL PROVISIONS

This case involves the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

On September 12, 1979, a woman named Carol Pufpaf was assaulted by a man she described to the police as a white male with an olive complexion, dark brown hair cut in a "GI" or military style, five feet nine inches in height, weighing about 150 pounds, and about 19 years of age. (App 16.)

Petitioner, an eighteen year old member of the United States Marine Corps who wore his blond hair in a regulation military haircut, was arrested in the morning of September 16, 1979 as a suspect in the Pufpaf assault. (App. 17.)

In contrast to the offender who had been described by Pufpaf, petitioner "has light skin and very blond hair" (App. 22), stands six feet tall and weighs 165 pounds. (App. 17.)

Following his arrest, petitioner denied that he was the

offender and stated that he had been with the daughters of another Chicago police officer at their home at time of the incident.[1] (App. 22-23.) Petitioner was exhibited in a lineup to Pufpaf on September 16, 1979.[2] Petitioner was the only person in the lineup with a military-style haircut. (App. 17.)

Pufpaf later told the state prosecutor that "she was talked into . . . the identification by other persons on the scene who kept telling her, gee, look at the facts, it must be him." (App. 23.) On the basis of Pufpaf's identification, petitioner was charged with the offenses of attempt murder, attempt rape, attempt burglary and home invasion and was held in custody in lieu of $250,000 bail.

Pufpaf had another opportunity to view petitioner prior to trial and concluded that petitioner was not her assailant. Petitioner secured a bond reduction and was released on January 4, 1980.

On February 5, 1980, all charges against petitioner were dismissed. The prosecutor explained that she had discovered that petitioner had a solid alibi and was the victim of a mistaken identification (App. 22):

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1. The prosecutor who later verified petitioner's alibi learned that "on the night in question [petitioner] was by anyones account was wearing a 'Mickey Mouse' T-shirt. The victim in this case, no matter what she remembers or doesn't remember, remembers the offender in this case definitely did not have a 'Mickey Mouse' T-Shirt on." (App. 23.)

2. A photograph of the lineup is reproduced *ante* at 1.

> I spoke to the victim, Carol Pufpaf, about this at length and it was her opinion that she certainly was not now convinced and definitely decided the defendant was not the person who committed the crime in question. Carol expressed to me her opinion that she would stick by her original description and that the Defendant had dark brown hair and olive skin and *the reason for picking him out of the lineup and being confused was the military look definitely portrayed by the defendant in this case, the same type of military look that she recalled the Defendant or perpetrator of this crime having.* (emphasis supplied)

Petitioner commenced this action on April 1, 1981, seeking monetary compensation for the damages he had incurred during and as a result of his incarceration.[3] The district judge to whom the case was originally assigned concluded that the complaint stated a claim against respondents Williams and Stanley. (App. 14.) Following reassignment of the case, the successor judge dismissed the case, concluding that police officers cannot be liable under 42 U.S.C. §1983 "for conducting an improper lineup." (App 19.) In the view of the district court, the *Wade-Gilbert-Stovall* trilogy and their progeny do not implicate substantive rights, but "simply establish a prophylactic rule that protects a defendant's right to a fair trial by barring the admission of unreliable eyewitness identifications." (App. 19.)

On appeal, the Seventh Circuit observed that this "is a case of first impression" (App. 5) and held that, as a matter of law,

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3. Petitioner testified at his deposition that he been beaten on five occasions while incarcerated and had frequent nightmares about the events.

police officers who arrange an unnecessarily suggestive lineup that causes a suspect to be misidentified and deprived of his (or her) liberty are not subject to suit under 42 U.S.C. §1983. (App. 6-9.)

The court of appeals also found (in the first instance) that "the lineup at issue in the present case was not unduly suggestive." (App. 9.) In making this finding, the court of appeals did not consider that petitioner had been misidentified because of the suggestiveness of the lineup.

REASONS FOR GRANTING THE WRIT

-I-

Petitioner's claim is that he was deprived of his liberty without due process of law because respondents Williams and Stanley, acting under color of their authority as Chicago police officers, caused petitioner to be mistakenly identified as the perpetrator of a crime and held in custody for 111 days.

In what it viewed as a "case of first impression," (App. 5), the Seventh Circuit held that there is no violation of constitutional rights when police officers cause an innocent man to be mistakenly identified and incarcerated for 111 days. The resolution of this question by the Seventh Circuit is in apparent conflict with decisions in other circuits and is at odds with prior decision of this Court. The decision of the Seventh Circuit in this case represents a significant lessening of the meaning of "liberty" in the Due Process Clause of the Fourteenth Amendment and should be reviewed by this Court.

In *Stovall v. Denno*, 388 U.S. 293 (1967), the Court held that when an identification procedure is conducted in a way that is "so unnecessarily suggestive and conducive to

irreparable mistaken identification" the result is a denial of due process of law. Id. at 302. The Court reaffirmed this view in *Foster v. California*, 394 U.S. 440 (1969), where the suggestive identification procedures "so undermined the reliability of the eyewitness identification as to violate due process." Id. at 443. Again, in *Neil v. Biggers*, 409 U.S. 188, 198 (1972), the Court focused on "the likelihood of misidentification which violates a defendant's right to due process. . ." Id. at 198.

The court of appeals in this case concluded that *Stovall* and its progeny did not implicate substantive rights but "establish procedural safeguards to insure that only reliable identification evidence is admitted at trial. *Stovall* and *Brathwaite* do not establish a right to an impartial lineup as long as the evidence gained through that lineup is not used at trial." (App. 8.) The analysis adopted by the Seventh Circuit misses the point of petitioner's claims and relegates the Due Process Clause of the Fourteenth Amendment to mere precatory language.

Police officers who arrange suggestive identification procedures are engaged in the same "police overreaching," *Colorado v. Connelly*, 107 S.Ct. 515, 520 (1986) involved in securing an involuntary confession. Just as extracting a confession by questioning an accused for an extended period as in *Ashcraft v. Tennessee*, 322 U.S. 143 (1944), is "revolting to the sense of justice," *Brown v. Mississippi*, 297 U.S. 278, 286 (1936), so too exhibiting a suspect in a lineup which is arranged to make an identification "all but inevitable," *Foster v. California, supra*, 394 U.S. at 443, must be deemed offensive to the concept of "ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) implicit in the Due Process Clause of the Fourteenth Amendment. When, as here, the improper identification procedures caused an innocent man to be

deprived of his liberty for 111 days, the police officers who arranged the unnecessarily suggestive lineup and who encouraged the eyewitness to make an erroneous identification should be subject to suit under 42 U.S.C. §1983.

The Seventh Circuit relied on two opinions written by then Judge, now Mr. Justice, Stevens to reach a contrary result. In *Christman v. Hanrahan*, 500 F.2d 65 (1974), the plaintiff, who had been acquitted of criminal charges, claimed that the delayed disclosure of exculpatory evidence had interfered with his right to a fair trial. The timing of the disclosure was not prejudicial because the criminal trial had resulted in an acquittal. 500 F.2d at 500 n.2. In contrast to *Christman*, petitioner in this case does not complain of impairment of a right to a fair trial — petitioner's claim is that he was deprived of his liberty for 111 days as the result of respondents' actions in securing the erroneous identification.

The Seventh Circuit was likewise mistaken in its reliance upon *United States ex rel. Kirby v. Sturges*, 510 F.2d 397 (7th Cir. 1975). In *Kirby*, Mr. Justice (then Judge) Stevens wrote in the context of a proposed exclusionary rule that "[t]he due process issue . . . does not arise until testimony about the showup — or perhaps obtained as a result of the showup — is offered at the criminal trial." 510 F.2d at 406. The "due process issue" involved in the admission of evidence at trial is different from the "due process issue" which arises when police officers cause an innocent man to be locked up for 111 days.

The distinction between fair trial rights and the liberty interest involved in this case was recognized by Mr. Justice Stevens in his dissenting opinion in *Baker v. McCollan*, 443 U.S. 137 (1979): "[T]he Due Process Clause equally requires that fair procedures be employed to ensure that the wrong

individual is not subject to the deprivation of liberty attaching to pretrial detention." Id. at 447. When, as in this case, police officers do not employ "fair procedures," but instead arrange an unnecessarily suggestive lineup and talk an eyewitness into making an identification by "telling her, gee, look at the facts, it must be him" (App. 23), an action should lie under 42 U.S.C. §1983 to recover damages from the officers for the loss of liberty resulting from their overreaching.

The courts which have considered the due process question presented by this case have reached conflicting results. In *Jaroslawicz v. Seedman,* 528 F.2d 727 (2d Cir. 1975) the Second Circuit held without extended discussion that a civil rights action could be maintained on allegations that a lineup had been unduly suggestive. Id. at 732 n.6. The original district judge in this case reached the identical result (App. 14), as did the district judge in *Brooks v. Fitzsimmons,* 558 F.Supp. 840, 843-44 (N.D.Ill. 1987).

The Third Circuit reached a conflicting result in *United States ex rel. Birnbaum v. Dolan,* 452 F.2d 1078 (3d Cir. 1971), reasoning that there could not have any constitutional deprivation because testimony about the lineup identification had not been used at trial. Similar reasoning was adopted by the district court in *Nygren v. Predovich,* 637 F.Supp. 1083, 1086 (D.Colo. 1986).

The decision of the Seventh Circuit in this case represents a significant lessening of the meaning of "liberty" in the Due Process Clause of the Fourteenth Amendment and should be reviewed by this Court.

-II-

The factual determination by the court of appeals that petitioner had not been mistakenly identified because of an

unnecessarily suggestive lineup is based on a serious misreading of prior decisions of this Court about lineups and is a vast departure from the accepted and ordinary rule that questions of fact should not be determined in the first instance by an appellate court. *DeMarco v. United States,* 415 U.S. 449, 450 n.* (1974).

The question of whether a lineup was "so unnecessarily suggestive so as to result in a substantial likelihood of misidentification," *Neil v. Biggers,* 409 U.S. 188, 198 (1972) is generally answered by the "totality of the circumstances," i.e., "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Neil v. Biggers, supra* at 199. These four factors cannot be controlling when, as here, the eyewitness states that she made a misidentification because of the suggestiveness of the lineup.

Even if the *Biggers* factors are relevant when the eyewitness admits that the suggestiveness of the lineup caused here to make a misidentification, the way in that court of appeals applied those factors to the record in this case was wrong. The state court prosecutor conceded that the eyewitness had a poor opportunity to observe because she "did not get a very good look at the offender." (App. 3.) The prosecutor also admitted that the witness' degree of attention was slight, because she had been looking at "a very large knife" rather than at the offender. (Id.) The accuracy of the witness' prior description of the offender was slight: unlike the offender described by the eyewitness — dark brown hair, olive skin, 5'9" tall, weighing about 150 pounds (App. 16) — petitioner "has light skin and very blond hair" (App. 22) and is six feet

tall and weighed 165 pounds. (Id.) Moreover, the level of certainty shown by the witness at the confrontation was slight — the witness "was talked into . . . the identification by other persons on the scene who kept telling her, gee, look at the facts, it must be him." (App. 23.) Finally, the eyewitness later decided that petitioner "was not the person who committed the crime in question." (App. 22.)

The court of appeals found that the lineup had not been "unduly suggestive" (App. 8) because each of the five white males in the lineup appeared to be about twenty years of age, each wore a "T-shirt" and pants, and "were of approximately the same height and weight." (Id.) Decisions of this Court require a broader inquiry to answer the question of whether a lineup was "so unnecessarily suggestive so as to result in a substantial likelihood of misidentification." *Neil v. Biggers,* 409 U.S. at 198.

The district court carefully avoided resolving the disputed questions about the suggestiveness of the lineup. (Ap. 13.) The decision of the court of appeals to resolve this question in the first instance is a vast departure from the accepted and ordinary rule that "fact finding is the basic responsibility of district courts, rather than appellate courts, and . . . the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court," *DeMarco v. United States,* 415 U.S. 449, 450 n.* (1974), that should be corrected by this Court.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari be granted.

October, 1987

Kenneth N. Flaxman
53 West Jackson Boulevard
Suite 1315
Chicago, Illinois 60604
(312) 431-0082

Frederick F. Cohn
205 West Wacker Drive
Suite 1515
Chicago, Illinois 60606

APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

No. 86-1827

GARY HENSLEY,

Plaintiff-Appellant,

v.

BERNARD CAREY, ROBERT STANLEY, THEODORE WILLIAMS, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

Before Posner and Coffey, Circuit Judges, and Grant, Senior District Judge.*

COFFEY, Circuit Judge.

Plaintiff-appellant Gary Hensley appeals the district court's grant of a summary judgment in favor of defendants-appellees Theodore Williams and Robert Stanley on his claim that Williams and Stanley allegedly conducted a suggestive lineup which resulted in Hensley being arrested and confined for a period of 111 days. We affirm.

On September 12, 1979, an unknown man followed Carol Pufpaf to her home at 4120 N. Campbell in Chicago, Illinois. While Pufpaf was entering the front door of her home, the unknown man entered the house through an unlocked rear door, confronted Pufpaf and forced her onto a bed. The assailant fled after Pufpaf and her seven year-old son started screaming. Pufpaf subsequently

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* The Honorable Robert A. Grant, Senior District Judge of the Northern District of Indiana, is sitting by designation.

described the assailant as a white male with an olive complexion, dark brown hair, about 5' 9"' in height, approximately 150 pounds in weight, and about 19 years of age.

Hensley, a white male, 18 years of age, with a blond military-style haircut, with light skin, is 6' 0"' tall, weighed 165 pounds, and was a member of the United States Marine Corps on active duty in the city of Chicago. Three days after the assault, on September 15, 1979, Hensley was stopped by a Chicago police officer who questioned him and asked for identification. The following day, two police officers visited Hensley's home in the company of Chris Vandenberg, a witness who had observed a man following Pufpaf into her home. Vandenberg identified Hensley in the presence of the police officers as the man he had seen following Pufpaf. The two officers placed Hensley under arrest and conveyed him to the local police station.

During the evening of September 15, 1979 appellant Theodore Williams, a Chicago police officer, arranged for a lineup that included Hensley and five other white males. Hensley was the only person in the lineup wearing a short military-style haircut. Even though Williams was aware of this fact he and another officer, Detective John Beaumont, attempted to but were unable to locate any other white males with short haircuts, including members of the police department itself, to participate in the lineup. Appellant Robert Stanley, also a Chicago police officer, approved of the lineup, and the group was exhibited to Pufpaf. Pufpaf identified Hensley as her assailant, and Hensley was subsequently indicted on various criminal charges of burglary, attempted rape, and attempted robbery. Hensley, unable to post bond, remained in custody for 111 days while awaiting trial.

According to the prosecuting attorney assigned to the case, Pufpaf's seven- year-old son after observing Hensley at a preliminary hearing[1] stated to the mother "that is not the man," meaning

that Hensley was not Pufpaf's attacker. According to police investigators, they believed Pufpaf's son had more than ample opportunity to view the assailant during the attack as he observed the assailant push his mother into the bedroom. After her son's comment, Pufpaf told the prosecuting attorney that she had not had a good look at her assailant and picked Hensley out of the lineup because of his short hair. While Pufpaf was not sure whether Hensley was her attacker after her son's comment, she maintained that her earlier description of the assailant had been accurate. At the hearing in which the state court dismissed the charges pending against Hensley, the prosecution stated:

> "I spoke to the victim, Carol Pufpaf, about this at length and it was her opinion that she certainly was not now convinced and definitely decided the defendant was not the person who committed the crime in question. Carol expressed to me her opinion that she would stick by her original description and that the Defendant had dark brown hair and olive skin and the reason for picking him out of the lineup and being confused was the military look definitely portrayed by the Defendant in this case, the same type of military look that she recalled the Defendant or perpetrator of this crime having.
>
> She further went on to say that she did not get a very good look at the offender on the date in question due to the fact that she was staring at a very large knife that he was jabbing towards her and pushing her into a bedroom."

The police re-evaluated the case and conducted a further investigation of Hensley's prior alibi that he had been elsewhere at the time of Pufpaf's attack and now convinced of Hensley's truthfulness released him on January 4, 1980.

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1. The record is unclear as to whether Pufpaf's son attended the hearing held on September 24, 1979 or on September 28, 1979.

On March 23, 1981, Hensley filed suit against Williams and Stanley pursuant to 42 U.S.C. s 1983 alleging that his constitutional rights had been violated under the Fifth, Sixth, and the due process clause of the U.S. Constitution in that the officers had conducted a suggestive lineup. Hensley originally named Bernard Carey, the Cook County States Attorney, Williams, Stanley and various other defendants in his suit but the district court dismissed all but Williams and Stanley. Hensley appeals the district court's grant of summary judgment in favor of Williams and Stanley.

II

"A grant of summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Wainwright Bank & Trust Company v. Railroadmens Federal Savings & Loan Association of Indianapolis*, 806 F.2d 146, 149 (7th Cir.1986). Since the essential facts are not in dispute, we must determine whether the defendants, the moving parties, were entitled to judgment as a matter of law. "In order to determine whether the complaint (pursuant to 42 U.S.C.§1983)[2] has alleged a deprivation of a federally protected right, it is necessary to identify the precise right that plaintiff seeks to vindicate." *Christman v. Hanrahan*, 500 F.2d 65, 67 (7th Cir.1974). In his complaint, Hensley alleges that his "due process and Fifth and Sixth Amendment rights were violated by the manner in which the line-up was conducted." In *Christman v. Hanrahan*, 500 F.2d 65 (7th Cir.1974), we affirmed the dismissal of a complaint under

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2. 42 U.S.C. §1983 (1982) states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

§1983 and held that the plaintiff's Sixth and Fourteenth Amendment rights were not violated through prosecutorial misconduct which failed to result in an unfair trial. In *Christman*, this Court rejected the suggestion that "the Due Process Clause ... provide(s) broad generalized protection against misdeeds by police or prosecution" and concluded that "the mission of the clause ... (is) avoidance of an unfair trial to the accused, and no violation ... result(s) unless the misconduct had some prejudicial impact on the defense." Id. at 67.

Hensley argues that the district court improperly granted summary judgment in favor of Williams and Stanley on his claim pursuant to 42 U.S.C. §1983. He maintains that defendants-appellees deprived him of his Fifth, Sixth, and Fourteenth Amendment rights because they subjected him to an unduly suggestive lineup. The appellees maintain that they were entitled to a summary judgment as a matter of law since the Constitution does not guarantee a suspect an impartial lineup. This is a case of first impression since, as the district court stated, "it appears that no court has yet passed on whether police officers may be liable under §1983 for conducting an improper lineup." 633 F.Supp. 1251, 1253 (N.D.Ill.1986).

Hensley bases his argument that his constitutional rights were violated and he should recover damages pursuant to 42 U.S.C. s 1983 relying on *Stovall v. Denno*, 388 U.S. 293 (1967), and *Manson v. Brathwaite*, 432 U.S. 98 (1977). In *Stovall v. Denno*, 388 U.S. 293 1199 (1967), the United States Supreme Court held that whether a defendant's due process rights are violated through the admission of evidence at trial derived from an unnecessarily suggestive lineup or confrontation with a witness depends on the totality of the circumstances surrounding the lineup or confrontation. In *Manson v. Brathwaite*, 432 U.S. 98 (1977), the Supreme Court described its holding in Stovall "as protecting an evidentiary interest." Id. at 113. Thus, the procedural safeguards established in *Brathwaite* and *Stovall* protect only against the admission of unreliable evidence at trial and does not establish a constitutional right to be free of suggestive lineups as Hensley argues.

In granting summary judgment for the defendants in this case, the district court reasoned that the procedural safeguards discussed in *Stovall* and *Brathwaite* provide "no support for the plaintiff's contention that an improper lineup proceeding in itself constitutes a distinct and actionable constitutional wrong." *Hensley v. Carey*, 633 F.Supp. 1251, 1253 (N.D.Ill.1986). The court correctly stated that *Stovall* and *Brathwaite* "simply establish a prophylactic rule that protects a defendant's right to a fair trial by barring the admission of unreliable eyewitness identifications." Id. *Stovall* and *Brathwaite* establish a rule which bars the admission of unreliable identification evidence at trial. The rule against admission of evidence from unnecessarily suggestive lineups is a prophylactic rule designed to protect a core right, that is the right to a fair trial, and it is only the violation of the core right and not the prophylactic rule that should be actionable under §1983.

In *Cerbone v. County of Westchester*, 508 F.Supp. 780 (S.D.N.Y.1981), the court dismissed a plaintiff's complaint under 42 U.S.C. §1983 based on allegations analogous to the present case. In *Cerbone*, the plaintiff maintained that a village police department was liable under §1983 since its officers subjected him to a "show-up"[3] which had been unduly suggestive. The court stated:

> "Cerbone (plaintiff) does not allege that the evidence from the 'show-up' itself was introduced at his trial or that any harm resulted from it. The mere failure of a 'show-up' to pass constitutional requirements, without a showing of resulting prejudice, does not establish a constitutional deprivation. The constitutional guarantee against a pretrial confrontation 'that is unnecessarily suggestive and conducive to irreparable mistaken identification' does not exist

3. A "show-up" differs from a "lineup" in that only one individual is exhibited to a witness and that witness is asked whether he or she can identify that individual as the perpetrator of whatever crime is being investigated. See *Kirby v. Illinois*, 406 U.S. 682, 684-85 (1972).

> in vacuo but is meaningful only by reference to the right of an accused to a fair trial, of which it is a corollary. No violation of the due process clause occurs unless an improper identification has some prejudicial impact on an accused's defense."

Id. at 786. Similarly, in *Pyles v. Keane*, 418 F.Supp. 269 (S.D.N.Y.1976), the court also dismissed a complaint based on §1983 in which the plaintiffs maintained that their constitutional rights were violated simply because they were subjected to an unduly suggestive show-up. The court held that the plaintiffs failed to state a claim under §1983 since they could not show that any witness who attended the unduly suggestive show-up ever testified at a criminal trial which resulted in the plaintiffs' convictions. The court stated:

> "The present complaint neither states nor suggests that plaintiffs suffered convictions after a trial or trials at which the tainted 'show-up' evidence was admitted against them. Nor apparently could it truthfully so state; as previously noted, it is undisputed that Charles and Walter Pyles were tried only on unrelated charges, without testimony of witnesses who had attended the allegedly suggestive 'show-up.' As discussed above, this is fatal to plaintiffs' claims."

Id. at 275. In both *Cerbone* and *Pyles*, the court emphasized that the Constitution guarantees the right to a fair trial and that procedural rules prohibiting the introduction of evidence derived from unduly suggestive lineups exist only to protect an accused's right to a fair trial. *Cerbone*, 508 F.Supp. at 786; *Pyles*, 418 F.Supp. at 275. In the present case, Hensley has no claim under §1983 arising out of his participation in an unduly suggestive lineup since he was not deprived of his right to a fair trial. He could not possibly have been deprived of his right to a fair trial since he was never tried.

To support its decision that a defendant does not have a right to an impartial lineup in itself, the district court analogized to a set of cases in which criminal defendants brought §1983 actions against police officers alleging that the officers were liable under §1983 for failing to properly give the defendants Miranda warnings. The district court stated that "(a)lthough it appears that no court has yet

passed on whether police officers may be liable under §1983 for conducting an improper lineup, the rejection of such a cause of action would be consistent with decisions holding that police officers are not liable under §1983 for their failure to give Miranda warnings." 633 F.Supp. at 1253. In *Bennett v. Passic*, 545 F.2d 1260 (10th Cir.1976), the Tenth Circuit stated:

> "The Constitution and laws of the United States do not guarantee (plaintiff) the right to Miranda warnings. They only guarantee him the right to be free from self-incrimination. The Miranda decision does not even suggest that police officers who fail to advise an arrested person of his rights are subject to civil liability; it requires, at most, only that any confession made in the absence of such advice of rights be excluded from evidence. No rational argument can be made in support of the notion that the failure to give Miranda warnings subjects a police officer to liability under the Civil Rights Act (§1983)."

Id. at 1263. Applying the same logic that the Tenth Circuit used in Bennett here, we find that *Stovall* and *Brathwaite* establish procedural safeguards to insure that only reliable identification evidence is admitted at trial. *Stovall* and *Brathwaite* do not establish a right to an impartial lineup as long as the evidence gained through that lineup is not used at trial. Thus, the defendants could not have violated Hensley's constitutional rights simply by subjecting him to a lineup which was allegedly unduly suggestive.[4]

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4. At oral argument, counsel for Hensley cited *Kerr v. City of Chicago*, 424 F.2d 1134 (7th Cir.1970), to support his contention that Hensley's claim was cognizable under §1983. In *Kerr*, the plaintiff maintained that Chicago police obtained an involuntary confession and used it to illegally detain him for 18 months. This court held that a complaint alleging that police used coercion to extract an involuntary confession stated a claim under §1983. That case is distinguishable from the present case since in *Kerr* the plaintiff alleged that the police used physical force to extract an involuntary confession. Historically, courts have recognized that this use of force to extract an involuntary confession is actionable under s 1983 while a mere technical failure to follow court established rules of criminal procedure is not cognizable under §1983. See *Duncan v. Nelson*, 466 F.2d 939, 944 (7th Cir.1972).

Furthermore, we also note that the lineup at issue in the present case was not unduly suggestive. *Manson v. Brathwaite*, 432 U.S. 98 (1977); *Stovall v. Denno*, 388 U.S. 293 (1967). *See also United States ex rel. Kirby v. Sturges*, 510 F.2d 397 (7th Cir.1975). The participants in the lineup 1) wore similar clothing (T-shirts and trousers); 2) were of approximately the same height and weight; 3) were all white males approximately 20 years of age. Pufpaf had reported to police that she had seen the attacker and gave a description to the police which might very easily have fit any of the participants. The only feature that distinguished the defendant was his short hair. In addition, another witness, Vandenberg, identified Hensley as Pufpaf's attacker thus adding validity to Pufpaf's original identification and description. As the Wisconsin Supreme Court has stated:

> "The 'totality of the circumstances' reference is a reminder that there can be an infinite variety of differing situations involved in the conduct of a particular lineup. The police authorities are required to make every effort reasonable under the circumstances to conduct a fair and balanced presentation of alternative possibilities for identification. The police are not required to conduct a search for identical twins in age, height, weight or facial features. If an Eskimo were to be involved in a burglary in Vernon county, it is not to be expected that the sheriff will seek to locate or send to the Arctic for tribesmen who could pass as brothers. What is required is the attempt to conduct a fair lineup, taking all steps reasonable under the 'totality of the circumstances' to secure such result."

Wright v. State, 46 Wis.2d 75, 86, 175 N.W.2d 646, 652 (1970). While it is unfortunate that Hensley was subjected to confinement for 111 days due to Pufpaf's erroneous identification, from a review of the record we will not say that the lineup was improperly conducted. We affirm the district court's grant of summary judgment.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

No. 86-1827

GARY HENSLEY,

Plaintiff-Appellant,

v.

BERNARD CAREY, ROBERT STANLEY,
THEODORE WILLIAMS, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

[May 12, 1987]

JUDGMENT — ORAL ARGUMENT

HON. RICHARD A. POSNER, Circuit Judge
HON. JOHN L. COFFEY, Circuit Judge
HON. ROBERT A. GRANT, Senior District Judge*

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

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* The Honorable Robert A. Grant, Senior District Judge of the Northern District of Indiana, is sitting by designation.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

No. 86-1827

GARY HENSLEY,

Plaintiff-Appellant,

v.

BERNARD CAREY, ROBERT STANLEY,
THEODORE WILLIAMS, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

[July 16, 1987]

ORDER

HON. RICHARD A. POSNER, Circuit Judge
HON. JOHN L. COFFEY, Circuit Judge
HON. ROBERT A. GRANT, Senior District Judge*

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiff-appellant, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

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* The Honorable Robert A. Grant, Senior District Judge of the Northern District of Indiana, is sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GARY HENSLEY,

Plaintiff

No. 81 C 1630 *v.*

BERNARD CAREY, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER
[April 29, 1986]

DUFF, District Judge.

Defendants T. Williams and R. Stanley seek summary judgment on plaintiff's claim against them under 42 U.S.C. §1983. The court granted their motion by minute order on March 25, 1986, and this Memorandum Opinion and Order follows. Because no basis for this court's jurisdiction remains after allowance of the motion for summary judgment, the case is dismissed.

I. FACTS

On September 12, 1979, a man carrying a knife followed a woman to her home in Chicago, Illinois. He entered the house through an unlocked back door, forced the victim, a police officer's wife, onto a bed, then fled after the victim and her seven-year-old son began screaming.

The victim described her assailant to police as a white male with olive complexion, dark brown hair in a "GI" or military style, 5'9", 150 pounds, and 19 years old.

On September 15, 1979, a police officer stopped plaintiff Gary Hensley and reported that he fit the description of the assailant. The following day, two police officers visited plaintiff's home in the company of Chris Vandenberg, who had seen a man follow the victim to her house shortly before the attack. Vandenberg told the

officers that plaintiff was the same man he had seen following the victim, and plaintiff was placed under arrest. Plaintiff is a white male, 6"0", with blond hair and light skin, and at the time of his arrest was 18 years old, 165 pounds, and wore a military-style haircut.

On the evening of plaintiff's arrest, defendant Williams conducted a lineup that was approved by defendant Stanley. The participants were six young white men, including plaintiff. Except for plaintiff, however, none of the participants had a military-style haircut; all of the others had long hair. Defendant Williams was aware of this disparity when he conducted the lineup, and had searched unsuccessfully for other young white men with crew cuts. Plaintiff claims that Williams and Stanley nonetheless went ahead with the lineup because they were anxious to resolve a crime against a fellow officer's wife.

The victim attended the lineup and positively identified plaintiff as her assailant. Plaintiff was indicted on charges stemming from the attack, and at a hearing in which the only evidence presented was the victim's testimony identifying plaintiff, a judge found probable cause to hold him for trial. Plaintiff was unable to post bond and remained in custody awaiting trial.

At one of plaintiff's three appearances for a preliminary hearing, the victim's son was present. He had had an ample opportunity to view the assailant during the attack, but had not attended the lineup because of the late hour. When he first saw the plaintiff, however, he told his parents without hesitation that "That is not the man."

Prompted at least in part, by her son's comment, the victim reconsidered her identification of plaintiff. She told the prosecuting attorney that she had not had a good look at her assailant and that she would stick with her original statement that he was 5'9" and 150 pounds, with olive skin and dark brown hair. She said that she picked plaintiff out of the lineup only because he was the sole participant with a hair style resembling the assailant's and that had it not been for the misleading nature of the lineup, she would not have identified plaintiff.

The victim's husband reported his son's statement to the police officer investigating the case. That officer then re-examined plaintiff's claim that he had been elsewhere at the time of the attack, which an initial investigation had discounted, and concluded that the alibi was in fact sound.

Plaintiff was released from custody on January 4, 1980, after 111 days of detention. On February 5, 1980, the state moved to voluntarily dismiss the charges against plaintiff and the motion was granted. Plaintiff filed this action on March 20, 1981, seeking compensatory and punitive damages.

Plaintiff alleges that defendants Williams and Stanley violated his rights under the Fourteenth, Fifth, and Sixth Amendments to the United States Constitution and 42 U.S.C. §1983 by intentionally conducting a lineup that they knew was misleading. In addition to his §1983 claim, plaintiff alleges various causes of action under state law. Defendants Williams and Stanley have moved for summary judgment on plaintiff's §1983 claim. All other defendants have been dismissed.

II. DISCUSSION

Although this is a motion for summary judgment, defendants direct their arguments principally to the sufficiency of plaintiff's complaint, contending that the constitution neither guarantees suspects an impartial lineup nor requires the exclusion at a preliminary hearing of evidence derived from an unnecessarily suggestive lineup.

In defense of his claim, plaintiff points to three Supreme Court decisions dealing with unnecessarily suggestive lineups in the context of criminal prosecutions: *Stovall v. Denno*, 388 U.S. 293 (1967); *Neil v. Biggers*, 409 U.S. 188 (1972); and *Manson v. Brathwaite*, 432 U.S. 98 (1977).

In *Stovall*, the Court held that whether a defendant's due process rights are violated by the admission at trial of evidence derived from an unnecessarily suggestive confrontation depends on the totality of the circumstances surrounding the confrontation. 388

U.S. at 301-02. *Biggers* and *Brathwaite* hold that *Stovall* and its progeny do not establish a strict constitutional rule of exclusion for evidence derived from unnecessarily suggestive confrontations, but rather protect an evidentiary interest that is adequately guarded by excluding such evidence at trial unless the totality of the circumstances indicates that the identification is reliable. 409 U.S. at 199-201 at 382-83; 432 U.S. at 113-14.

Stovall, Biggers and *Brathwaite* do not stand for the the proposition that the Constitution guarantees a right to an impartial stitution guarantees a right to an impartial lineup. They simply establish a prophylactic rule that protects a defendant's right to a fair trial by barring the admission of unreliable eyewitness identifications. This rule provides no support for plaintiff's contention that an improper lineup proceeding in itself constitutes a distinct and actionable constitutional wrong.

Although it appears that no court has yet passed on whether police officers may be liable under §1983 for conducting an improper lineup, the rejection of such a cause of action would be consistent with decisions holding that police officers are not liable under §1983 for their failure to give *Miranda* warnings.

> The Constitution and laws of the United States do not guarantee [plaintiff] the right to Miranda warnings. They only guarantee him the right to be free from self-incrimination. The Miranda decision does not even suggest that police officers who fail to advise an arrested person of his rights are subject to civil liability; it requires, at most, only that any confession made in the absence of such advice of rights be excluded from evidence. No rational argument can be made in support of the notion that the failure to give Miranda warnings subjects a police officer to liability under the Civil Rights Act.

Bennett v. Passic, 545 F.2d 1260, 1263 (10th Cir.1976). See also *Turner v. Lynch*, 534 F.Supp. 686, 689 (S.D.N.Y.1982); *O'Hagan v. Soto*, 523 F.Supp. 625, 629 (S.D.N.Y. 1981), *reversed on other grounds*, 725 F.2d 878 (2d Cir.1984); *Chrisco v. Shafran*, 507 F.Supp. 1312, 1317-18 (D.Del.1981); *Hampton v. Gilmore*, 60 F.R.D. 71, 81 (E.D.Mo.1973), *aff'd*, 486 F.2d 1407 (8th Cir.1973).

Cf. Thornton v. Buchmann, 392 F.2d 870, 874 (7th Cir. 1968) (officer's failure to give Miranda warnings is of "no significance" to plaintiff's civil rights claims against officer stemming from allegedly wrongful arrest).

Plaintiff suggests that if the lineup itself did not violate his rights, then his rights were violated when the victim's testimony identifying plaintiff was admitted at the preliminary hearing. This argument is flawed for two reasons. First, plaintiff has brought this action against the police officers who conducted the lineup. Defendants Williams and Stanley were not responsible for the admission of the victim's testimony at the preliminary hearing; indeed, there is no evidence that they were even present when the alleged violation of plaintiff's rights occurred. Because their actions were not directly linked with any violation of plaintiff's civil rights, Williams and Stanley cannot be held liable under §1983. *Rizzo v. Goode*, 423 U.S. 362, 370-73 (1976).

Second, the Constitution does not forbid the admission at a preliminary hearing of evidence derived from an improper lineup. "Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination." Fed. R. Crim. P. 5.1(a). *Giordanello v. United States*, 357 U.S. 480, 484 (1958).

For the above reasons, the court concludes that plaintiff has failed to state a claim against defendants Williams and Stanley under §1983, and accordingly grants the motion for summary judgment.

Because the only claims remaining after the grant of summary judgment are pendent state claims, this court's continued jurisdiction is no longer appropriate and the action is dismissed.

IT IS SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GARY HENSLEY,

Plaintiff

No. 81 C 1630 *v.*

BERNARD CAREY, et al.,

Defendants.

MEMORANDUM OPINION
[May 12, 1982]

CHARLES P. KOCORAS, District Judge:

Defendants have moved for various reasons to dismiss plaintiff Gary Hensley's two-count complaint. For the following reasons, the motions of defendants O'Grady, Nolan, DiLeonardi, Brzeczek, Williams, and Stanley are denied as to the cause of action pleaded pursuant to 42 U.S.C. Section 1983, and granted with respect to the allegations alleged under 42 U.S.C. Sections 1981 and 1985. The motions of the City of Chicago, Bernard Carey, and certain unidentified Assistant State's Attorneys are granted in all respects.

Count I of Hensley's complaint alleges that defendants deprived him of his constitutional liberty rights by holding him in jail for 111 days after charging him with a crime they should have known he did not commit. The imprisonment allegedly resulted from an unconstitutionally suggestive lineup procedure. The charges were ultimately dismissed when the Assistant State's Attorney assigned to the plaintiff's criminal case conceded that Hensley did not fit the description given by the victim. Hensley seeks damages under 42 U.S.C. Sections 1981, 1983 and 1985 for this purported constitutional violation. Count II incorporates the factual allegations of count I and charges that the defendants' acts also constituted state pendent causes of action for "false arrest, false imprisonment, intentional infliction of emotional distress, malicious prosecution, negligence, and gross negligence." (Complaint para. 26) Named as defendants in both counts are the City of Chicago; Bernard Carey,

the former State's Attorney of Cook County; certain unnamed Assistant State's Attorneys; three former superintendents of the Chicago Police Department, James O'Grady, Sam Nolan, and Joseph DiLeonardi; the current superintendant of the Chicago Police Department, Richard J. Brzeczek; and Chicago Police Officers Williams and Stanley, who are alleged to be "directly responsible for conducting the suggestive line-up." (Comp. para. 20(b).)

–A–

As an initial matter, defendants argue that the invocation of Sections 1981 and 1985 is inappropriate here because plaintiff has failed to charge violative conduct within the protective ambit of those provisions of the Civil Rights Act. This court agrees, and therefore dismisses the putative causes of action under those sections as to all defendants for failure to state a cause of action. Section 1981 is clearly intended to "prohibit racial discrimination in the making and enforcing of private contracts," *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), and is limited to situations involving racial discrimination. *Abshire v. Chicago & E. R. R. Co.*, 352 F.Supp. 601 (N.D. Ill. 1972). Hensley's complaint is wholly devoid of any allegations of racial discrimination, and any claim asserted under §1981 is accordingly dismissed. *See Forman v. General Motors Corp.*, 473 F.Supp. 166, 177-78 (E.D. Mich. 1978).

Similarly, Section 1985 relates to claims of class-based discriminatory conspiracies. Hensley's complaint contains no allegations of any "class-based discriminatory animus on the part of the conspirators", *Jordan v. City of Chicago, Department of Police*, 505 F.Supp. 1 (N.D. Ill. 1980), and his claims under Section 1985 are therefore unfounded.

–B–

In order to successfully state a cause of action against the City of Chicago under Section 1983, the acts complained of must have occurred pursuant to an official custom or policy adopted or promulgated by the local governmental body; recovery predicated

on a theory of vicarious liability or *respondeat superior* is clearly barred. *Monell v. Department of Social Services*, 436 U.S. 598 (1979). Plaintiff Hensley's complaint completely fails to allege any specific action by the City in this case. Indeed, the only mention of the City in the complaint is in paragraph 4, which lists it as a "municipal corporation". There is no direct or implicit allegation that any City policy or custom existed in this case, much less that it caused plaintiff's purported injury. Even under the must liberal interpretation of the complaint, the most that can be inferred is that plaintiff is seeking to assert a *respondeat superior* claim against the City. *Monell* precluded this attempt, and the City is therefore dismissed from this action.

–C–

The heart of plaintiff's complaint is that he was placed in an improperly suggestive line-up by defendants Williams and Stanley, and was identified by the victim because he was the only person in the line-up with a "military-type" crew-cut haircut; this was allegedly the primary distinguishing feature of the purported assailant. Although defendant's motion to dismiss charges that the claims against Williams and Stanley are conclusory and should therefore be stricken, defendants have not supported this assertion in any manner in their memorandum in support of their motion. Indeed, they appear to have abandoned their assertion that the factual allegations set forth fail to state a claim against the two officers. In any event, this court finds that the allegations of the complaint, taken as true for purposes of this motion, adequately plead a cause of action against Williams and Stanley under Section 1983.

–D–

Claims against supervisory officials must allege personal involvement in the violative conduct in order to be actionable, and allegations based on *respondeat superior* are barred by *Monell, supra.* In order to establish liability under Section 1983 for deprivation of constitutional rights through the acts of their subordinates, an affirmative link must be proven between the

supervisory officials' acts *or omissions* and the actions directly causing the alleged violation, so that the supervisors can be said to have encouraged, approved of, or acquiesced in the violation. *Stringer v. City of Chicago*, 464 F.Supp. 887, 891 (N.D. Ill. 1979). And although allegations of mere negligent supervision by a police superintendent are plainly insufficient to state a Section 1983 claim, *Id.* at 891, allegations of gross negligence in training subordinates are enough to withstand a motion to dismiss. *Owens v. Hass*, 601 F.2d 1242 (2nd Cir. 1979). Here, Hensley has alleged that defendants Brzeczek, O'Grady, Nolan, and DiLeonardi were grossly negligent in training their subordinates in the proper lineup procedures. Although these charges may be difficult to substantiate at a later stage in this action, for present purposes they pass the threshold inquiry of a motion to dismiss. Plaintiff should be allowed to conduct discovery aimed at uncovering evidence to support his claim that these defendants were grossly negligent in training their subordinates in proper constitutional procedures.

–E–

The allegations directed at former Cook County State's Attorney Carey and his unnamed Assistants are clearly barred by *Imbler v. Pachtman*, 424 U.S. 409 (1976), and are accordingly dismissed. Prosecutors enjoy absolute immunity from liability under Section 1983 where their putatively violative conduct occurs within the ambit of their prosecutorial duties. *See Briscoe v. La Hue*, 663 F.2d 713 (7th Cir. 1981). Here, it is clear that the conduct of the State's Attorneys was directly related to their prosecutorial responsibilities. Former State's Attorney Carey and his unnamed assistants are therefore dismissed for this action. Carey's motion for fees is, however, denied.

Conclusion

For the foregoing reasons, the claims asserted pursuant to Sections 1981 and 1985 are dismissed; the City of Chicago is dismissed; Bernard Carey and the unnamed Assistant State's Attorneys are dismissed; the motions to dismiss the Section 1983 claims against the individual named police officers and officials are denied.

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT–CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

No. 79-6182 *v.*

GARY HENSLEY,

Defendant.

REPORT OF PROCEEDINGS

BE IT REMEMBERED that this cause came on for hearing before the Hon. FRED G. SURIA, one of the judges of said Court, on the 5th day of February, A.D. 1980.

APPEARANCES:
Hon. C. BERNARD CAREY,
State's Attorney of Cook County
MRS. FRAN NOREK,
Assistant's State's Attorney
appeared for the People;
Mr. Fred H. COHN,
appeared for the Defendant.

THE CLERK: Gary Hensley.

MR. COHN: Attorney Fred H. Cohn here with my client, Gary Hensley.

MRS. NOREK: The State has reviewed this case and reviewed it carefully and in the opinion of the State the Defendant did not commit the crime in question.

I received, however, an order to nolle this case from Mr. Mike Ficaro. On the 30th of this month I advanced the case for purpose of nolleing.

Simply, for the record, many of the reasons that we are, in fact, nolleing the case is this:

The Defendant standing in front of you you can see his height, his description. The original description of the victim is five, nine, one hundred and fifty pounds, olive skin and dark brown hair. Obviously Mr. Hensley is Nordic and has light skin and very blond hair.

I spoke to the victim, Carol Pufpaf, about this at length and it was her opinion that she certainly was not now convinced and definitely decided the defendant was not the person who committed the crime in question. Carol expressed to me her opinion that she would stick by her original description and that the Defendant had dark brown hair and olive skin and the reason for picking him out of the lineup and being confused was the military look definitely portrayed by the Defendant in this case, the same type of military look that she recalled the Defendant or perpetrator of this crime having.

She further went on to say that she did not get a very good look at the offender on the date in question due to the fact that she was staring at a very large knife that he was jabbing towards her and pushing her into a bedroom.

However, there was another eyewitness to the crime, that being seven and a half year old very bright son of the victim in this case. That boy got an extremely good look at the offender as he watched the offender push his mother into her bedroom. That boy was not brought to the lineup because of the hour that it was held and when the victim and her son arrived in Branch 42, the son took one look at Mr. Gary Hensley and said, "Mom, that is not the man." He was not at all hesitant about it. He described this to his father, who is a Chicago Police Officer and the father, in fact, talked to Investigator Strahulla, who was the investigator interested in this case because he is also a marine, as is the Defendant in this particular case.

I had this case on my desk due to the fact of his description and the Defendant's attributes, in an attempt to check out the alibi. That was unsuccessfully not checked out out on the date that the Defendant was arrested. The alibi, your Honor, consists of Officer Thomas of the 23rd District who lived at 2706 West Leland whose daughters were in the company of the Defendant on the night in

question. The Defendant, in fact, told us on the date that he was arrested that he was with Cynthia and Tina Thomas, but there was some confusion over times and even though it checked out, it appeared that the times did not cover the alibi. I, in fact, talked to Officer Thomas who allowed me to talk to his daughters and his daughters explained to me, as they had to their father, that the Defendant in the case had arrived at their home about 7:30. The crime did not happen until ten to eight on the same evening. Officer Thomas further expressed the opinion that it does cover the alibi due to the fact he had not informed his daughters that Gary Hensley had been arrested or there was any problem. He simply inquired of them what time did Gary come over and they said about 7:30. Certainly there is no reason for them to lie at this point.

I talked to the girls and I do believe the girls' testimony. Gary Hensley was, in fact, at their home at the time of the crime.

Furthermore, in addition, the victim, understanding that she was confused, that she was talked into, as she said, the identification by other persons on the scene who kept telling her, gee, look at the facts, it must be him, she is convinced her son is correct and Gary Hensley is not the appropriate person to be charged with this crime.

Furthermore, we have negative evidence to the fact that Gary Hensley on the night in question was by anyones account wearing a Mickey Mouse T-shirt. The victim in this case, no matter what she remembers or doesn't remember, remembers the offender in this case definitely did not have a Mickey Mouse T-shirt on.

Furthermore, Mr. Fred Cohn has obtained a polygraph examination, which, although not admissible, I would like the record to reflect that the polygraph was done by F.L. Hunt and Associates, Incorporated and I am in possession of a copy of that polygraph examination which covers all of the appropriate questions which the defendant successfully passed.

I will simply say it is rather frightening with the evidence I have and the eyewitness that I could, in fact, convict Mr. Gary Hensley of this crime and for those reasons the State is nolleing this case.

THE COURT: Mr. Cohn.

MR. COHN: Your Honor, I must give thanks to the State for doing what they have done. We, of course, make a formal demand on the record, your Honor.

THE COURT: Motion State, nolle pros allowed. The Defendant ready and demands trial.

Likewise I join in commending the State for the following through and doing that which is appropriate based upon the facts which they checked out.